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April 19, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 9, 2004

Case No.: TIA-0195

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be denied.

*I. Background*

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Worker was employed as a general maintenance laborer at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 7 years, from 1955 to 1962.

The Applicant filed an application with the OWA, requesting physician panel review of the Worker's prostate cancer with metastasis to the bone, bladder, and blood. The Applicant alleges the prostate cancer was caused by exposures to toxic and hazardous materials during the course of the Worker's employment at the Plant. The Physician Panel found there was insufficient evidence linking workplace exposures to the Worker's prostate cancer. The Panel discussed the lack of an epidemiologic relationship between toxic exposures and prostate cancer. Additionally, the Panel referenced the high incidence of prostate cancer in men in the general population. See Physician's Panel Report. The Panel rendered a negative determination, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. In her appeal, the Applicant alleges that the Worker's illness was caused by exposure to toxic chemicals at the plant. The Applicant states that she feels the Panel's findings were in error. See Applicant's Appeal Letter.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant has not demonstrated panel error in the prostate cancer determination. The Panel rejected the Applicant's contention that the Worker's prostate cancer was due to toxic exposure from his employment at the plant. As mentioned above, the Panel addressed the claimed illness, made a determination on the illness, and explained the basis of that determination. Specifically, the Panel determined that there was no evidence establishing a relationship between the Worker's occupational exposures and the development of the prostate cancer. See Physician's Panel Report. The Applicant's stated belief that the Panel's finding is incorrect is a mere disagreement with the Panel's medical judgment rather than an indication of Panel error.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0195, be, and hereby is, denied.

(2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 19, 2005